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Supreme Court of the United States

October Term, 1970.

No. 89.

ALTON J. LEMON, ET AL.,
Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, ET AL.,
Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF THE SCHOOL DISTRICT OF PHILADELPHIA, *AMICUS CURIAE.*

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BRIEF OF THE SCHOOL DISTRICT OF PHILADELPHIA, *AMICUS CURIAE*.

INTEREST OF THE *AMICUS*.

The School District of Philadelphia is charged with educating over 290,000 children in the City's public elementary, junior high, senior high, and technical high schools. Like the parents of these children, the School District wants its students to receive the best possible preparation for adult life.

For many big-city public school systems, however, including Philadelphia's, this goal appears to be receding out of reach. Traditional educational techniques have not proven successful in the classrooms of inner-city schools. Students are often hostile or bored, falling further behind with each year of instruction. And the sense of failure which inner-city students experience in school often extends into their adult lives.

Yet the new teaching techniques and instructional materials which must be developed, perfected, and implemented on a large scale before existing conditions can be improved will not materialize without huge expenditures of funds. Referring to the current lack of such funds, renowned educational innovator, Dr. Mark R. Shedd, Philadelphia's Superintendent of Schools, has written:

> In Philadelphia, the Board of Education, the School District staff, and the community unmistakably are committed to quality education and reform. But even the most deeprooted enthusiasm and optimism can be stifled if devoted people committed to change constantly must look over their shoulder at the specter of bankruptcy.[1]

1. Proposed Operating Budget of the School District of Philadelphia, Fiscal Year Beginning July 1, 1970, p. 2.

The School District of Philadelphia shares its educational and related financial problems with the City's nonpublic schools, especially the Archdiocese of Philadelphia, which provides secular as well as sectarian education for over 144,000 Philadelphia elementary and high school children. Because their common problems are now so critical, both organizations have recognized the necessity of working together to solve them. Essentially, while the students in each system can benefit from successful innovations developed by the other, each system may face an influx of students and new problems without any assistance if the other cannot provide the quality secular education Philadelphia parents rightfully expect.

Thus, it is in the interest of the School District of Philadelphia and Philadelphia public school children to see that the parochial school system provides the most effective secular education possible for its students. Accordingly, we support the purchase of educational services from nonpublic schools as promoting that end, and submit this brief *amicus curiae*.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED.

This brief is addressed to the single question whether Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, violates the Establishment Clause of the First Amendment as it is applied to parochial schools.

ARGUMENT.

1. The Purpose and Primary Effect of Act 109 Is to Improve the Education of All Philadelphia School Children.

In its opinion below, the three-judge court examined Act 109 in conjunction with the standard established in *Abington School District v. Schempp*, 374 U. S. 203 (1963) and followed recently in *Board of Education v. Allen*, 392 U. S. 236 (1968) for determining whether alleged public welfare legislation breaches the wall of separation between church and state. The test, as announced in *Schempp*, is:

> [W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (374 U. S. at 222)[2]

Permeating this test is a concept of governmental neutrality, which prevents government from directly sponsoring a religious institution, but also prevents it from denying basic services to individuals simply because a religious institution may incidentally be benefited. The two classic applications of this principle, in *Everson v. Board of Education*, 330 U. S. 1 (1947), and *Board of Education v. Allen*, *supra*, upheld state grants to parents for bus transportation

2. Very recently, in *Walz v. Tax Commission*, 397 U. S. 664 (1970), this Court restated this test as a question "whether particular acts . . . are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669.

to and from parochial schools and state loans of textbooks to parochial school students. In each case this Court acknowledged that some benefit would accrue to the religious institution,[3] but determined that the thrust of the legislation was to provide a much needed public service to children *regardless* of their religious affiliation. Similarly, the Court has repeatedly stated that government may constitutionally provide sectarian institutions with police, fire, and other such protection. *Everson v. Board of Education, supra,* at 17; *Walz v. Tax Commission,* 397 U. S. 664, 671 (1970).

In upholding tax exemptions for church property, the Court noted in *Walz* that constitutional neutrality is not a rigid concept. The Court cautioned that

> "[R]igidity could well defeat the basic purpose of [the Establishment and Free Exercise Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. (397 U. S. at 669)

While noting that risks inhere in any program requiring administrative relationships between church and state, the Court concluded that it is possible to chart a course which

3. The Court in *Walz v. Tax Commission,* 397 U. S. 671, saw through the contention, now raised by Plaintiffs, that students attending parochial schools, not the schools themselves, were benefited by the lending of textbooks in *Allen.*

appropriately preserves religious freedom and encourages religious instruction in the best of our traditions, but does not establish religion. 397 U. S. at 672.

In the instant case, there are certain landmarks which can guide the Court as it pursues that course. Act 109 permits the state to purchase secular educational services from nonpublic schools in the subjects of mathematics, modern foreign languages, physical sciences, and physical education. The nonpublic schools must in return use books approved by the state, achieve a prescribed level of pupil performance, and, after five years, employ only teachers certified by the state to teach these secular subjects. Appellants claim that these provisions amount to no more than subsidy of a religious enterprise, although they fail to demonstrate how in substance reimbursing an institution for specific materials and services after they have been provided is any more of a subsidy than providing books directly as in *Allen*. In fact, the quality controls built into Act 109 are a signal that the legislation was designed to promote educational excellence for Philadelphia private and parochial school children. An additional signal, marking the purpose and effect of the legislation, is that the benefits of improved education, as promoted by Act 109, will extend indirectly to Philadelphia's public school children as well.

Clearly, the Pennsylvania legislature understood the nature of these indirect benefits. Section 2 of Act 109, declaring legislative findings, states that educational excellence has become increasingly important to national and individual well-being, that such excellence has become an increasingly costly burden on the Commonwealth in relation to other basic services that must be provided, and that nonpublic schools assume a sizeable portion of this potential burden. The legislature concludes:

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

The economics of public education in Philadelphia unquestionably bear out this finding. The School District of Philadelphia is having difficulty providing adequate facilities and instruction for the students it currently serves. According to Dr. Shedd,

> "Total enrollment (including pre-school) still exceeds the total optimum capacity of existing permanent facilities by almost 30 percent. Half of the elementary and 70 percent of the secondary schools in Philadelphia are overcrowded now . . . ."[4]

In some junior and senior high schools, dual shifts have been instituted because of the severe overcrowding. In the District's proposed operating budget for 1970-71, labelled by the Superintendent of Schools a "budget of frustration," important teaching positions and services have been cut from the junior and senior high school programs, as well as from adult and special education, in order to meet even more critical needs of early childhood and elementary education. In addition, important com-

4. Introduction, The School District of Philadelphia Proposed Capital Budget and Program—1971-1976, page iv.

munity and individual student services, such as opening schools at night and counselling, have been reduced. Given the already poor performance of Philadelphia school children on nationally standardized tests, these reductions can hardly be afforded. As the Superintendent describes the budget,

> It's not a pretty picture. The process of constant budget cutting is debilitating, demoralizing, and destructive. Promising programs are lost.[5]

But incredibly, despite all the paring, the School District's proposed budgeted expenses still exceed known receipts by over $29.8 million.[6]

Educationally and financially sound nonpublic school systems are able to cooperate with the School District to improve education for everyone, through sharing of new ideas, facilities, instructional materials, and services. For example, the School District has recently constructed an elementary school beside an existing parochial school, creating opportunities for shared instructional programming and for shared playground, gymnasium, and other facilities.[7] At the same time, sound nonpublic school systems provide competition for the public schools, from which educational innovations come, both systems benefit, and progress results.[8]

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5. Proposed Operating Budget of the School District of Philadelphia, Fiscal Year Beginning July 1, 1970, pp. 2-3.

6. *Id.* at 45.

7. Testimony presented to the House Committee on Basic Education of the Pennsylvania Legislature by David A. Horowitz, Deputy Superintendent of Instruction of the School District of Philadelphia, April 3, 1968.

8. The President's Message to Congress Proposing a Series of Actions to Improve Elementary and Secondary Education, March 3, 1970, in Weekly Compilation of Presidential Documents, Monday, March 9, 1970, Volume 6, number 10 at 312.

But conversely, nonpublic schools which fail to provide the high quality secular education parents expect can have a debilitating, even paralyzing, influence on the public school system. Given the importance of secular education today to a child's future success,[9] many parents are unlikely to tolerate grossly inferior secular education in the parochial schools simply to obtain sectarian education as well. And parents of private school students are likely to defect even more rapidly from inferior schools. The inevitable result will be an influx of nonpublic school students into the public school system.

The School District, however, does not have unused excess capacity with which to absorb these potential transferees. Its capacity is exceeded even now. And the additional operating expense for each nonpublic school student, using proposed per pupil expenditures for 1970-71, would be $799 in elementary school, $899 in junior high school, and $1,059 in senior and technical high school. These costs include both direct instructional costs and allocated overhead costs but exclude debt service as well as other semi-variable costs.[10]

At these rates, if the over 148,000 pupils now enrolled in Philadelphia nonpublic schools, including over 144,000 parochial school students, transferred to the public schools,

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9. In *Brown v. Board of Education*, 347 U. S. 483 (1954) the Court established that

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (*Id.* at 493)

10. These figures are derived from the Proposed Operating Budget of the School District of Philadelphia, Fiscal Year Beginning July 1, 1970.

the total cost to the public would be almost $129 million, including plant operations and maintenance costs but excluding costs applicable to the acquisition, lease, or construction of school buildings. Certainly the huge capital investment necessary to provide new facilities could be sharply reduced if the nonpublic schools permitted the School District to take over their existing facilities. However, the additional capital cost burden to the public would still be substantial. If the School District staff is demoralized and nearly incapacitated by present financial conditions, it would be overwhelmed by an influx of nonpublic school students into the public school system.

Thus, Pennsylvania is preserving definite educational advantages for all Philadelphia school children and preventing catastrophe for all by promoting excellence in secular education in the private and parochial schools through Act 109. At the same time, it is saving the public considerable amounts of money which can be spent on other pressing needs, since the cost of purchasing educational services from nonpublic schools is much less than the cost of absorbing nonpublic school students into the public school system. During the school year 1970-71, Philadelphia parochial schools will receive only $4.3 million for the purchase of educational services; private schools will receive $1.3 million. In a recent message to Congress, President Nixon noted the importance of parochial schools in promoting educational diversity, and stated that nationwide, the cost to the public if all nonpublic schools closed would exceed $4 billion per year for operations by the end of the 1970's, with an estimated $5 billion more needed for facilities.[11]

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11. The President's Message to Congress Proposing a Series of Actions To Improve Elementary and Secondary Education, *supra*, at 312.

Plaintiffs have characterized these educational and financial considerations as "*in terrorem*", and "not . . . a justification for an otherwise constitutional [sic] enactment." But at least one court has distinguished the purpose and effect of Pennsylvania's Act 109 from the purpose and effect of a statute which does fit those descriptions. In *Opinion of the Justices,* 261 A. 2d 58 (1970), a plurality of judges on the Maine Supreme Court stated in an advisory opinion that "the financial benefit to the non-public schools was inferential" in Act 109; while in the proposed Maine statute, based on explicit legislative findings that the parochial schools were on the brink of closing, aid is "expressly and directly solicited." On this basis, and on the ground that Act 109 was limited to specific nonvalue-oriented secular subjects while the Maine bill was not, the Maine court found that the decision of the three-judge court in this case was neither apposite in fact nor decisive in law. And in his concurring opinion in *Walz,* Justice Brennan stated that a legitimate basis for granting tax-exempt status to church property is that religious organizations "contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community." 397 U. S. at 687.

The *Schempp, Allen,* and *Walz* tests do not prohibit incidental financial benefit to a sectarian institution, so long as there is a primary purpose and effect which serves the public welfare. The Pennsylvania legislature, in attempting to preserve constructive cooperation and competition between public and nonpublic schools through Act 109, primarily provided benefits for every school child in Philadelphia, and served the public well.

2. Act 109 Does Not Cause Government to Interfere Unconstitutionally With Religion.

While Plaintiffs apparently accept the *Schempp-Allen* test as the basis for determining whether Act 109 offends the Estatblishment Clause, they contend that the constitutionality of Act 109 further depends on whether the act creates an interdependence between church and state. However, in *Walz,* this Court considered the tests of "interdependence" and "entanglement" interchangeable with language in the *Schempp* test stating that legislation is unconstitutional if it *aids or inhibits* religion. 397 U. S. at 672-74.

Whatever the wording, "the test is inescapably one of degree." *Walz v. Tax Commisssion,* 397 U. S. at 674. Thus, one convenient point of departure is whether Act 109 inhibits or interferes with religion to a significantly greater extent than the statutes involved in *Everson* and *Allen.* Chief Judge Hastie contends in his dissenting opinion below that such a difference exists; but he does not elaborate. In fact, he refers to *Allen* only to demonstrate similarities between the dangers of state involvement in the curriculum of parochial schools in the two cases (Appendix to Brief for Appellants at A107). Plaintiffs argue in their brief that the bus transportation provided in *Everson* was "finite in quantity," while the nature of a cash subsidy, presumably as provided in Act 109, is "limited in amount only by the political power of religious groups" (Brief for Appellants at 27). This contention indicates that Plaintiffs have misperceived Act 109. The state funds paid to parochial schools through Act 109 are not a vague subsidy; they are paid to parochial schools for performing very particular educational services. Unless these schools expand their instruction in the subjects for which educational services are purchased, they cannot receive additional

funds under Act 109. To obtain more money without expanding instruction in the four specified subjects, parochial schools would have to lobby for qualitatively different, though related legislation, such as legislation providing for purchase of services in reading instruction. But Act 109 gives parochial schools no more incentive to seek other legislation than the statute in *Allen* gives them to seek legislation providing desks, chairs, and notebooks to parochial school students on request. In either case, there is no inevitable progression from one piece of legislation to another.

Plaintiffs contend further, however, that the fact that the state may purchase only educational services which are secular in nature creates unwarranted state supervision over sectarian affairs. This contention is subject to two criticisms.

First, Plaintiffs are contradicting themselves. They seem to acknowledge that the state could make demands of parochial schools identical to those in Act 109 (approved textbooks, certified teachers, standardized test performance) apart from the purchase of educational services, as part of its compulsory education requirements (Brief for Appellants at 35; Brief of American Association of School Administrators et al., *Amici Curiae* at 12). Yet they also argue that these same demands cause church and state to become unconstitutionally entangled.

Second, experience has not borne out Plaintiffs' contention that undue entanglement will occur. In determining the constitutionality of tax exemption for church property in *Walz,* this Court carefully inquired into the amount of church-state involvement generated over the long history of that practice, and found little. Although church-state relationships such as those established in Act 109 have not long pervailed, what experience the School District of

Philadelphia has had with similar relationships indicates that they need not constrain the sectarian partner. Under the Elementary and Secondary Education Act of 1965, 20 U. S. C. §§ 241a-m, federal funds are allocated to local education agencies, which must be public, to provide special educational services for children of low-income families who go to public or parochial schools in the areas serviced by the agencies. Control of all funds as well as of teachers and instructional materials paid for with the funds rests in the public agency. 20 U. S. C. § 241e(a)(3); 45 CFR § 116.19. These special services are to be designed to meet the needs of all school children in the relevant district, regardless of whether they attend public or parochial schools.

The opportunities for rivalry, currying favor, and lobbying to increase the grant formula can be imagined, but only imagined. In Philadelphia, there has been harmony and mutual consideration in the planning process carried on between the School District and the Archdiocese Board of Education, but also independence of needs and thought. In his testimony before the House Committee on Basic Education of the Pennsylvania Legislature on April 3, 1968, David A. Horowitz, Deputy Superintendent of Instruction of the School District of Philadelphia, gave two illustrations of this process. As a result of meetings between the two school systems, federal funds were budgeted to meet priority needs of the parochial school system in speech therapy and remedial reading which did not coincide with those of the public schools. The School District also loaned instructional materials, musical instruments, and teaching machines to parochial schools to meet their particular needs.

Plaintiffs' contention that Act 109 invites unnecessary entanglement between the state and parochial schools survives neither logic nor experience. As Chief Judge Hastie

admitted in his dissent below, "[R]eligion's interest and the state's interest in the public good necessarily overlap" (Appendix to Brief for Appellants at A103). In such areas of overlap, there are inevitably administrative relationships between church and state. But Act 109 does not extend these relationships beyond permissible bounds. It is properly concerned with the quality of secular education in nonpublic schools, and injects that concern only into subjects which allow minimal intermingling of the secular and the religious.

CONCLUSION.

Whether the inquiry is into its primary purpose or effect or into the church-state interdependence it may cause, Act 109 stands as a proper attempt to improve the secular education of public and nonpublic school children alike. From experience, we know that the potential benefits to the children of Philadelphia are great, the hazards avoided are great, and the risks relatively small. We believe Act 109 is constitutional on its face and as applied, and that the decision of the three-judge court below should accordingly be affirmed.

Respectfully submitted,

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August, 1970